No. 95-1081

In The

Supreme Court of the United States

October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, IN LIQUIDATION, BY AND THROUGH THE MISSISSIPPI INSURANCE GUARANTY ASSOCIATION,

Petitioners,

versus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, AND MAGGIE YATES (Widow of Jefferson Yates),

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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PETITIONERS' REPLY BRIEF ON THE MERITS

PREFACE

This reply is directed to the Response Brief of Maggie Yates (Claimant), the Response Brief of the Federal Respondent (Director), and the Amicus Brief of "Asbestos Victims of America" (Amicus).

ARGUMENT

I. THE 33(g) ISSUE

Respondents concede that Mrs. Yates entered into unapproved third-party settlements where, in exchange for cash payments, she released her future claims for the wrongful death of her husband for less than the compensation to which she would be entitled from Ingalls pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"). They do not dispute that by entering into these unauthorized third-party settlements, Mrs. Yates exposed Ingalls to increased compensation liability to her by settling for amounts less than Ingalls' exposure to her under the LHWCA, and terminated Ingalls' subrogation rights against the asbestos manufacturers under the LHWCA. They do not disagree that the design of and purpose for 33 U.S.C. § 933(g) is to prevent a worker or those claiming through him from entering into unapproved third-party settlements for less than the compensation to which they are or would be entitled and thereafter seeking the difference from the employer who must pay benefits "irrespective of fault" under the LHWCA. *See* Claimant's Brief at pp. 20-23, 25, 26; *see also* Director's Brief at pp. 17, 28-30, 32, 33, 35-37; *Amicus* Brief at pp. 4, 20-23. Instead,

they argue that the plain language of § 933(g) creates a loophole which permits a claimant and those claiming through him to escape the responsibility to not prejudice the employer's interest which the statute was designed to protect.

The path to the loophole they claim to have found begins with the language in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992). They argue, extrapolating language from *Cowart*, that the right of a potential widow to receive death benefits does not vest until her husband dies. Although they concede that the compensation liability of Ingalls arose at the time of the employment injury to Mr. Yates, and concede that the longshore subrogation rights of Ingalls were terminated when Mrs. Yates entered into the unapproved third-party settlements, they argue that Mrs. Yates should be excused from the reach of § 33(g) because her unapproved settlements occurred before the death of her husband.

Respondents base their argument on the possibility that intervening events could terminate the right of a spouse to LHWCA benefits before the death of the employee occurs. The examples they give are divorce, the employee's death from an unrelated ailment, the spouse predeceasing the worker, or a change in the law. If any of those events occur, a spouse would not be entitled to LHWCA benefits for the employment-related death of the employee. At the same time, his employer would not be prejudiced by the spouse's unapproved third-party settlements because the employer would have no liability to the spouse under the LHWCA. However, the simple truth is that Mrs. Yates did not divorce her husband, his asbestos exposure did contribute to his death, and there was no material change in the law. In other words, there are no hypothetical scenarios here to consider as Mrs.

Yates has filed her claim and now seeks compensation from Ingalls notwithstanding her unauthorized third-party settlements. Given these circumstances, Ingalls was prejudiced by Mrs. Yates' unauthorized third-party settlements because she settled for less than the compensation to which she "would be entitled" from Ingalls, and Ingalls' LHWCA subrogation rights were terminated by the settlements.

The Respondents say "so what" as they interpret the phrase "person entitled to compensation" without regard to the context of the statute or the very purpose for which it was intended. They ignore the plain language of § 33(g)(1) which bars compensation to any person who enters into unapproved third-party settlements for "less than the compensation to which the person or the person's representative *would be entitled.*" 33 U.S.C. § 933(g)(1) (1986) (emphasis added). They seek to limit the definition of "person entitled to compensation" to a worker or his survivors having a *current* right to be *receiving* biweekly compensation payments only at the moment in time that the unapproved third-party settlements occur. The prejudicial effect of such unauthorized settlements on a LHWCA employer is the same whether the claimant is entitled at that moment or "would be entitled" at a later time to be in receipt of LHWCA compensation payments.

Respondents' interpretation of a "person entitled to compensation" would mean that a wife who enters into unapproved third-party settlements on the day before her husband's death would not be barred by § 33(g)(1) from seeking LHWCA benefits against his employer on the day

following his death.[1] It would also mean that where a worker contracted an asbestos-related lung cancer which did not immediately cause him to miss work, he would not then be a "person entitled to compensation" under the Act,[2] thereby giving him a license to enter into unapproved third-party settlements without regard to the employer's liability. Later, when his disease progressed to where he could not work, he could then seek LHWCA compensation from his employer without regard to § 33(g). In either circumstance, that employer would be subject to increased compensation liability to the extent that the wife or the worker settled their third-party claims for less than the compensation to which they would be entitled from the employer. In either circumstance, the structure of and purpose for 33 U.S.C. § 933(g) would simply be ignored and of no account.

The effect which would result from an acceptance of Respondents' argument would also cause discrimination against one class of claimants but benefit two other classes. For example, those employees who receive injuries to their limbs are entitled to be paid compensation based on the percentage of *anatomical*, not economic, impairment to those limbs under 33 U.S.C. § 908(c)(1)-(20) (1986). Such employees are to be paid

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[1] Had she entered into the unauthorized third-party settlements the day *after* her husband's death, all agree she would be barred by 33 U.S.C. § 933(g)(1)-(2) (1986).

[2] Under the Longshore Act, an award of biweekly compensation payments cannot be made in any occupational disease or whole body injury case unless the employee's wage earning capacity has been diminished by the injury or disease. 33 U.S.C. § 908(c)(21) (1986); *Gardner v. Director, OWCP*, 640 F.2d 1385, 1390 (1st Cir. 1981).

compensation for those anatomical impairments even if the injuries and impairments do not cause them to miss any time from work. *Potomac Elec. Power Co. v. Director*, 449 U.S. 268, 283 (1980). Thus, if such injured employees miss no work, they still are to be paid compensation for their anatomical impairments. If such persons sue and settle with responsible third-parties for such injuries, there can be no doubt that they are persons entitled to compensation.

The Respondents' argument, however, if applied to such claimants, would mean that they are only persons entitled to compensation if they are currently receiving or should be currently receiving payments from their employers. Where such a claimant was injured but had not yet been assigned an impairment rating for the injury,[3] under the Respondents' rationale such a claimant is not one entitled to compensation until his injured limb is given a rating, a result which leaves such a claimant free to settle with third-parties without any § 33(g) consequences, and without owing any § 33(f) credits/reimbursements.

Where the discrimination between classes of claimants occurs is best shown by examples. For the class of

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[3] For example, the claimant in *Cowart* injured his hand. *Cowart*, 505 U.S. at 471. If he lost no work and had not been assigned an impairment rating at the time of his unauthorized third-party settlements, then given the Respondents' argument, Cowart was not a "person entitled to compensation" at the time of such settlements. If following those settlements, his doctor assigned a disability rating to his injured hand, Cowart could collect full compensation benefits from his employer without offset for his earlier third-party settlements. If § 33(f) and (g) are construed as Respondents would have them construed, the potential for double recovery by workers would be endless.

claimants with injuries to the limbs, such claimants, who are entitled to benefits regardless of any wage loss, who settle with third-parties without their employer's consent at a time when they had been assigned an impairment rating for that injury by the Act, will, without doubt, experience the application of § 33(f) and (g). *See Cowart*, 505 U.S. at 471-483. Conversely, a second class of claimants with job-related injuries like back injuries or those due to asbestos exposure who are not currently experiencing a wage loss will be free to settle with third-parties for those injuries in total disregard of their employer's interest or liability to them. Likewise, the third class, dependents and spouses like Mrs. Yates, would be free to settle their personal injury claims before the injured worker's death and simply ignore the employer from whom they will seek compensation benefits.

These examples reveal that the first class of claimants lack the ability to maneuver and skate around § 33(f) and (g), whereas the other two classes, based on how they handle the timing of their settlements, can simply settle around and in total disregard of the employer's interest. Such practical examples as these reveal that the Respondents' argument seeks not clarity, but to produce incongruous results depending on the fortuitous circumstance of what part of one's body is injured at work and the timing of the consummation of the third-party settlements. Such distinctions do not square with the purposes behind § 33(f) and (g), and lead to the phrase "person entitled to compensation" being applied and interpreted in different ways in all three sections where it appears – § 914(h), § 933(f) and § 933(g). The only path the Respondents' argument takes us down leads to disharmony, differing (discriminatory) applications of the LHWCA

depending on the type of claimant, body part injured, and timing of a third-party settlement, and leads to incongruity between similar sections of the LHWCA. "[I]t is not to be lightly assumed that Congress intended that the LHWCA produce incongruous results." *Potomac Elec. Power Co.*, 449 U.S. at 283.

That disability and death benefits are distinct benefit categories under the LHWCA is irrelevant insofar as the compensation liability of a LHWCA employer is concerned. That liability is established at the time of injury. Moreover, the worker's right to benefits and, upon his death, those of his dependents, is/are established at the time of injury.[4] Section 8 of the Act provides for disability compensation to the worker because of his injury. 33 U.S.C. § 908 (1986). Section 9 allows a spouse and certain dependents to receive benefits, with the status of such persons being "determined as of the time of the injury." 33 U.S.C. § 909(f) (1986). The amount of compensation to be received by the worker and by his dependents upon his death are based upon the average weekly wage of the worker at the time of the worker's injury. 33 U.S.C. § 910 (1986). As can be seen, the entire compensation framework of the LHWCA, including its disability and death statutes, relates back to the time of the worker's injury. This is so regardless of when a claim is made or when a third-party settlement, obviously based on such an injury, is consummated.

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[4] Under the Longshore Act, the term "injury" is defined as "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. . . . " 33 U.S.C. § 902(2) (1986).

Section 33 permits all workers and their potential beneficiaries the right to recover from third-parties without foregoing their right to compensation benefits under the LHWCA.[5] To the extent that the worker sustained a compensable injury, he and his dependents are "persons entitled to compensation" based upon that injury. They are free to pursue third-party claims arising out of that injury at any time before or after the worker's death provided they secure employer approval if they settle for less than the compensation to which they "would be entitled" under the Act. This is because the compensation liability of an employer is fixed at the time of the injury regardless of when the compensation claim is made. As such, the employer is entitled to protection against his employee, or those claiming through him, accepting too little for his or their third-party claims, the effect of which exposes the employer, liable "irrespective of fault," to excessive compensation liability once the claim is made. 33 U.S.C. § 904(b) (1986); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971). If the worker dies from a work-related cause, the employer's compensation liability simply shifts from the worker to his dependents. If the worker and his dependents were free to enter into unauthorized third-party settlements simply because the worker's injury was not then economically disabling or the worker had not yet died, and at the same time preserve all of their LHWCA

[5] Its purpose is to place the burden ultimately on the person whose fault caused the injury. *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412 (1953); *see Peters v. North River Ins. Co.*, 764 F.2d 306, 310 (5th Cir. 1985).

rights against the employer, then the stated purpose of § 33(g) to protect employers from improvident third-party settlements would be eliminated.

The Respondents' interpretation of the phrase "person entitled to compensation" in § 33(g)(1) does not square with any reasonable interpretation of the same phrase in § 33(f) and § 14(h) of the LHWCA. For example, § 33(f) provides "if the person entitled to compensation" institutes a third-party proceeding, "the employer shall be required to pay as compensation a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person." 33 U.S.C. § 933(f) (1986).[6] If the Respondents' reading of "person entitled to compensation" is accepted, the § 33(f) credit would not be available to employers in any case where the worker secured a third-party recovery regardless of whether it was authorized or unauthorized by the employer. Potential scenarios which could defeat the § 33(f) credit include progressive occupational diseases such as asbestosis, asbestos-related lung cancer, silicosis, or even back injuries which had not progressed to the point of affecting a worker's wage earning capacity at the time of the third-party recovery. In the context of the LHWCA, they would not be "persons entitled to compensation" at the time of such recoveries received for the same job-related injuries covered by the LHWCA and

[6] In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), this Court observed that, because § 33(f) provides that a recovery from a third-party "reduces the compensation owed by the employer," the employer "is a real party in interest" in any recovery that might reduce or extinguish the employer's liability. *Cowart*, 505 U.S. at 482.

would be free to keep the third-party money and also seek compensation in full from the employer.

Similarly, § 14(h) of the LHWCA provides that the District Director shall, upon receipt of notice, from any "person entitled to compensation," make such investigations, cause such medical examinations to be made, or hold such hearings as he considers will properly protect the rights of all parties. If this phrase means what the Respondents say it means, then the District Director has no authority to investigate, schedule medical examinations, or hold hearings with respect to any worker who sustained an injury or occupational disease which had not then become economically disabling within the meaning of the LHWCA. Given this circumstance, the worker is not a "person entitled to compensation," and even if he needed medical treatment, he would not be entitled to the administrative benefits afforded him under § 914(h).

All parties in this case have argued that the plain language of the statute supports their position. However, does § 33(g)(1) speak with clarity to the unique facts of this case? If not, then the language of the statute does not directly answer the specific question posed, or is ambiguous, and judicial inquiry into the purpose behind the statute is required. *Stowell v. Secretary of Health & Human Services*, 3 F.3d 539, 542 (1st Cir. 1993); *Southeast Shipyard Ass'n v. United States*, 979 F.2d 1541, 1545 (D.C. Cir. 1992). If the language of § 33(g)(1) in isolation left any doubt, the intended purpose of the statute, which is to protect employers from improvident settlements, should remove that doubt.

Thus, if this Court finds § 33(g) to be ambiguous, a resort to the statute's purpose to clear any ambiguity will lead to one end: § 33(g) exists only for an employer's

benefit to guard against improvident settlements which serve to increase an employer's liability "irrespective of fault." *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 467 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060, 1062 (4th Cir. 1971); *see Stowell*, 3 F.3d at 542; 33 U.S.C. § 933(g) (1986).

The Director argues, however, that if there is any ambiguity in the statute, then his view is entitled to deference. *See* Director's Brief at p. 29 n.12. This Court has previously held that the views of the Benefits Review Board are not entitled to special deference because it performs only an adjudicatory function and is not charged with administering the LHWCA. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980). Similarly, in this case, the Director's interpretations should be entitled to no greater deference than that of the Benefits Review Board. *American Ship Bldg. Co. v. Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989); *Director, OWCP v. Detroit Harbor Terminals*, 850 F.2d 283, 287 (6th Cir. 1988); *Director, OWCP v. O'Keefe*, 545 F.2d 337, 343 (3rd Cir. 1976). In explaining why the Director's views should not be entitled to deference, several cases have cited the following rationale from *O'Keefe*:

> Based upon our reading of the statute, we conclude that neither the Director of the Office of Workmen's Compensation Programs nor the Benefits Review Board is entitled to "great deference" in the interpretation of the 1972 amendments. . . . First, neither the Director nor the Board is the officer or agency charged with the administration of the statute. While the Director is authorized by Congress to administer the statute he does not resolve disputed legal issues involving the LHWCA. Substantial questions of

> law arising in an adversarial context are specifically reserved for decision first by administrative law judges and then by the Board. Moreover, the Board is only a quasi-judicial body presented with select cases and not an agency involved in the overall administration of the statute. Congress has thus divided the various functions involved in administering the statute between the two different arms of the Department of Labor. We know of no authority which would require judicial deference to either one arm or the other under these circumstances.

O'Keefe, 545 F.2d at 343.

To be sure, the Director's views are not entitled to deference where they are articulated as a litigant in an adversarial proceeding rather than through the promulgation of regulations. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1984); *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 79 (1st Cir. 1992); *William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1324 (3rd Cir. 1987). Despite the fact that the phrase "person entitled to compensation" has been part of the LHWCA since its inception, the Director has never established a regulation regarding its intended definition. Moreover, the Director's position in this case is in direct conflict with the structure and purpose of § 33(f) and (g) and is entirely a litigating position, not a regulatory or administrative one, first advanced before the BRB and then the Fifth Circuit. His position is neither supported by the LHWCA nor mentioned in the underlying regulations.

The Director's position has also been inconsistent. As such, it is entitled to no deference. *William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987). For example, in *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991), the

Director argued that one's status as a "person entitled to compensation" need not be established at any particular moment. *Force*, 938 F.2d at 984-985. However, the Director has changed that position in this case. *See* Director's Brief at p. 34 n.16. Moreover, the Director argues here that the rights and responsibilities associated with a death claim do not arise until death, but in his comments to the final regulations following the 1984 amendments to the LHWCA, the Director stated that the rights and liabilities of a death claim arose at the time of injury since "coverage of a death claim does not turn on when death is sustained." 51 Fed. Reg. 4270, 4272 (1986). Accordingly, the Director's inconsistent interpretations should be entitled to no deference.

Respondents also argue that the Petitioners have not been prejudiced by Mrs. Yates' unauthorized third-party settlements, since the Petitioners retain the independent right to sue the third-parties for tort indemnity. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969). Under *Burnside*, an employer can assert a direct action in tort against the responsible third-party to recover payments made to the employee on account of his injury. *Burnside*, 394 U.S. at 418. The Respondents, however, cannot force the Petitioners to elect their remedies. Also, the LHWCA does not require the Petitioners to make such an election. The Petitioners are entitled to rely on their rights under the LHWCA. Further, a *Burnside* cause of action affords common law defenses to a third-party that are not available to the third-party in a direct action by the worker. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 7-13, at 460 (2d ed. 1994); *see Peters v. North River Ins. Co.*, 764 F.2d 306, 320 (5th Cir. 1985). The employer's right to be made

whole by the worker's third-party recovery is clearly justified given the fact that an employer has an absolute duty to compensate the worker regardless of fault. Moreover, the Claimant violated § 33(g)(1) when she entered into the unauthorized settlements, and the forfeiture provisions of § 33(g)(2) are self-executing regardless of *Burnside*.

In conclusion, the Ninth Circuit recognized in *Cretan* that the phrase "person entitled to compensation" *must* be given identical interpretations in both § 33(f), the crediting section, and § 33(g)(1) and 33(g)(2), the forfeiture sections of the Act. *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 848 (9th Cir.), *cert. denied*, 114 S. Ct. 2705 (1994). To allow the Fifth Circuit decision in this case to stand would create a situation entirely at odds with the LHWCA's goals. If not "persons entitled to compensation," individuals such as Mrs. Yates will be able to retain both full compensation against LHWCA employers plus all third-party recoveries, which is precisely the outcome § 33(f) exists to preclude. Moreover, Ingalls and all other LHWCA employers would lose their statutory protection against improvident third-party settlements, thus writing § 33(g) into oblivion and thwarting the very purpose for which § 33(g) was created.

II. THE DIRECTOR, OWCP, HAS NO STANDING TO PARTICIPATE IN THIS CASE

The Respondents concede that the Director has no statutory or financial interest in the outcome of this case. Nevertheless, they assert four grounds for granting the Director automatic standing as a respondent in this matter. First, they say that the Director, as a party respondent, need not have Article III standing since the "case or

controversy" requirement of Article III is satisfied by the controversy between Mrs. Yates and Ingalls. However, they offer no case law to support this proposition.

The Director must have some interest in the outcome of this litigation under Article III in order to actively participate because the jurisdiction of federal courts is limited to "Case" and "Controversies" by Article III of the Constitution of the United States. U.S. Const. art. III, § 2. "[T]he core component of standing is an essential and unchanging part of the case or controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The question of whether a party has standing involves both constitutional and prudential limitations on the exercise of federal jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To have standing before the court of appeals, one must have a "concrete and particularized, actual or *imminent* invasion of a legally protected interest." *Lujan*, 504 U.S. at 560 (emphasis added). Accordingly, entities having "no legal interest in *maintaining* or reversing a judgment or decree are not necessary parties to a writ of error or appeal." *Amadeo v. Northern Assurance Co.*, 201 U.S. 194, 201 (1905) (emphasis added); *Basket v. Hassell*, 107 U.S. 602, 603 (1883). Likewise, "[t]he general rule is that all parties in favor of whom a judgment or decree has been rendered below, or who are interested in having such a judgment or decree sustained . . . must be made appellees, respondents, or defendants in error." 36 C.J.S. *Federal Courts* § 201(5) (1955).

Using this rationale, the Fourth Circuit has consistently held that where the Director is not "adversely affected or aggrieved," then he does not have standing to respond to a petition for review before the court of appeals. *Parker v. Director, OWCP*, 75 F.3d 929, 935 (4th

Cir. 1996); *I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 526 n.1 (4th Cir. 1996); *I.T.O. Corp. of Baltimore v. Benefits Review Board*, 542 F.2d 903, 909 (4th Cir. 1976) (en banc), *vacated sub nom. Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904 (1977), *reaff'd, I.T.O. Corp. of Baltimore v. Benefits Review Board*, 563 F.2d 646 (4th Cir. 1977) (en banc).

The second ground asserted by the Respondents is based upon § 21(c) of the LHWCA, 33 U.S.C. § 921(c). However, § 21(c) is silent on whether the Director, OWCP, must be made a party respondent. 33 U.S.C. § 921(c) (1986).[7] This silence is significant when laid beside other provisions of law. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1285 (1995). For example, the Black Lung Benefits Act provides that "[t]he Secretary shall be a party in any proceeding relative to [a] claim for benefits." 30 U.S.C. § 932(k) (1986). Likewise, the Civil Rights Act of 1964 specifically authorizes the Equal Employment Opportunity Commission to "intervene in a civil action brought . . . by an aggrieved party." 42 U.S.C. § 2000e-4(g)(6) (1986). Accordingly, if Congress intended for the Director to have automatic standing as a respondent before the Courts of Appeals in a case such as this, Congress would have most certainly said so in § 21(c).

The third ground cited by the Respondents is based upon § 921a, which provides as follows:

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[7] In fact, it is questionable whether the Director would ever have standing to participate before the Court of Appeals, since the section is only applicable to a "person" who has been adversely affected or aggrieved by the decision of the Board, and the Act does not include the Secretary or the Director within the definition of "person." 33 U.S.C. § 902(1) (1986).

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 21 or other provisions of this Act except for proceedings in the Supreme Court of the United States.

33 U.S.C. § 921a (1986).

Although the statute uses the phrase "in any court proceedings," the obvious intent of the statute was to let the Secretary of Labor appoint counsel in cases in which the Secretary, deputy commissioner, or Board would otherwise have standing to participate. For example, notwithstanding § 921a, this Court held that the Secretary, via the Director, OWCP, is not entitled to appeal a LHWCA case without a financial stake in the outcome. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995). Moreover, the implementation regulations, specifically 20 C.F.R. § 801.401, provides that counsel will be appointed by the Solicitor of Labor "on any issues requiring representation."

Construing § 21a as merely designating the entity authorized to appoint counsel is also consistent with the history of the 1972 Amendments. Before the 1972 Amendments, the Secretary was represented by U.S. attorneys in the judicial district where the case was pending. The Secretary was a necessary party, since his designee made the rulings which were appealable only by injunction against his designee. *Crescent Wharf & Warehouse Co. v. Pillsbury*, 259 F.2d 850, 853-854 (9th Cir. 1958). To reduce the Secretary's direct participation in litigation, the 1972 Amendments eliminated the Secretary's involvement from most aspects of the litigative process. *See* H.R. Rep. No. 1125, 92nd Congress, 2d Sess. 13-14 (1972). In conformance with the foregoing general intent, § 21a was

amended. The legislative history to the amendment to § 21a merely states the following:

> This section amends section 21a of the Act. Under present law, it is the obligation of the United States attorney in the district where a case is pending to represent the Secretary or deputy commissioner in cases under the Act. Under the amendment made by this section, attorneys will be appointed by the Secretary to represent the Secretary, the deputy commissioner, a hearing officer, or the Board, except in proceedings in the Supreme Court.

H.R. Rep. No. 1441, 92nd Congress, 2d Sess. 21-22 (1972).

From the foregoing, it is obvious that § 21a was never intended to confer automatic standing upon the Secretary to participate in court proceedings where he had no real stake in the outcome. Instead, it merely gave the Secretary authority to hire his own counsel.

The final ground cited by the Respondents is based upon Rule 15(a) of the Federal Rules of Appellate Procedure. Rule 15(a) requires that an agency be named as a respondent in reviews of orders of an administrative agency. However, both the D.C. Circuit and the Fourth Circuit have held that Rule 15(a) is inapplicable to LHWCA proceedings, since the agency need not be named as a party to insure the proper adversarial clash between the employee and the employer. *Parker v. Director, OWCP*, 75 F.3d 929, 935 (4th Cir. 1996); *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 485 (D.C. Cir. 1982); *McCord v. Benefits Review Board*, 514 F.2d 198, 200 (D.C. Cir. 1975).

No section of the LHWCA or the Rules of Appellate Procedure automatically confers standing upon the Director to participate in court proceedings under the LHWCA

which do not affect his financial or statutory obligations. Accordingly, the Director must satisfy the Constitutional requirements of standing, the same as any other litigant. The silence of the statute must be interpreted to indicate that the Director lacks standing to respond where he lacks a concrete interest in the outcome. Therefore, this Court's ruling in *Newport News* should be extended to prohibit the Director's participation, whether as a petitioner or respondent, in the resolution of a private dispute between an employer and its employee.

CONCLUSION

This Court in *Cowart* recognized that the term "person entitled to compensation" must receive the same interpretation in both § 33(f) and 33(g) in accord with "the basic canon of statutory construction that identical terms within an Act bear the same meaning." *Cowart*, 505 U.S. at 479. The construction of a "person entitled to compensation" urged by the Respondents and accepted by the Fifth Circuit in this case, if applied to § 33(f) and (g), would lead to incongruous results based on what body parts were injured and the timing of third-party settlements, and would defeat these provisions' purpose which is to protect employers and their liability imposed "irrespective of fault" from improvident third-party settlements. As Mrs. Yates' claim under the LHWCA related to and arose because of her husband's injury, and as Mrs. Yates settled with third-parties due to that job-related injury, her actions affected the Petitioners' liability exposure and triggered the protective features found in § 33. Accordingly, she is not entitled to any additional compensation from Petitioners, and the Fifth Circuit's ruling

below should be reversed and judgment rendered for Ingalls.

Additionally, the LHWCA gives the Director no standing, either as an appellant, petitioner, or respondent, to actively participate in a worker's compensation claim involving a private dispute between an employer and its employee. Accordingly, the contrary ruling of the Fifth Circuit should be reversed.

Respectfully submitted,

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Dated: September, 1996